Public Prosecutor v Lee Fook

HIGH COURT (KOTA KINABALU) — CRIMINAL TRIAL NO K45–03 OF 2009
ABDUL RAHMAN SEBLI JC
9 MARCH 2010

Criminal Law — Penal Code — s 302 — Murder — Intention to cause bodily injuries sufficient in ordinary course of nature to cause death — Defences — Whether accused so drunk that he could not form intention to cause bodily injuries — Whether murder actuated by grave and sudden provocation — Whether accused legally insane

The accused was charged with murder under s 302 of the Penal Code. The prosecution relied on the evidence of PW9, a childhood friend of the accused to prove its case. According to PW9, the accused had called him over to his house as he ('the accused') was having a problem. Thereafter, PW9 went to the accused's house. Also present at the house was a Filipino man. Shortly thereafter, the deceased came at the invitation of the accused. They smoked syabu and drank liquor at the same time. The accused then asked them to join him in his car to look for his friend. They stopped by a riverside near a recreation park to collect some stones from the river. After they had placed the stones in the boot of the car at the request of the accused, they chatted. It was at this time the accused approached the deceased holding a parang. The accused slashed the deceased's left leg followed by a chop on the back of the neck. According to PW9, the accused's face was fierce and '*serupa mahu makan orang*' when he chopped the deceased's neck. PW9 was horrified. After that they left the scene, leaving the fatally injured deceased behind. When they reached the accused's home, the accused warned PW9 not to tell anybody about the incident or else he too would receive the same fate. The deceased's death was certified by the PW5, a forensic pathologist, to be due to the 'chop wound to the neck'. In his defence, the accused stated that he killed the deceased because he suspected the deceased of having an affair with his wife. He went on to testify that he was a drug addict and that on the date of the incident he took 'more than one set' of drugs. On the actual slashing itself, the accused stated that at the park, the deceased stared at him and he became scared. He took the parang from the bonnet of his car, walked towards the deceased and swung the weapon at his leg. When the deceased retaliated by trying to punch him, he swung the parang at the deceased's hand but hit his neck instead. The accused did not deny that the injury on the deceased's neck was caused by him.

He however claimed that he only intended to slash the deceased's hand and not to chop his neck.

Held, convicting and sentencing the accused to death:

(1) The medical evidence was consistent with PW9's evidence that after the accused slashed the deceased's leg, he chopped his neck. It was a continuous act. It was clear that the deceased was completely taken by surprise and had no chance of avoiding the murderous assault. He could not have tried to punch the accused after being slashed on the leg. The accused was armed and the deceased was not. The logical thing to do would have been to run away instead of trying to punch the accused. Having regard to the ordinary course of events, it was just not possible that the deceased tried to punch the accused after being slashed on the leg (see para 21).

(2) There is no doubt that when the accused brought the deceased to the recreation park, murder was on his mind. The parang in the bonnet was the intended weapon. It is obvious that the deceased was brought there to be executed. The brutality of the accused's act was also consistent with the act of a man consumed by the raging fire of jealousy (see para 23).

(3) There was no argument between the accused and the deceased either at the accused's house, in the car or at the park. Neither was there evidence that the deceased had done something or said anything that could cause the accused to lose his self control. At the park they even had time to collect stones from the river. The element of suddenness, if at all there was any provocation is completely absent. The accused's suspicion that the deceased was having an affair with his wife cannot by any stretch of the imagination amount to grave and sudden provocation. For the exception of grave and sudden provocation to apply something beyond mere suspicion must be established (see para 30).

(4) There was absolutely nothing in DW2's evidence to support the defence of insanity. On the contrary, his evidence clearly showed that the accused was not suffering from any infirmity of the mind when he killed the deceased. In fact, after the killing, the accused himself drove the car home and when they reached home he warned PW9 not to tell anybody about the incident. An insane person would not have the presence of mind to try to avoid the consequences of his criminal act. This was clear proof that the accused was not insane, legally or otherwise at the time he chopped the deceased's neck. This was cold blooded murder pure and simple (see para 32 & 34).

[Bahasa Malaysia summary

Tertuduh telah dituduh membunuh di bawah s 302 Kanun Keseksaan. Pendakwaan bergantung kepada keterangan PW9, rakan zaman kanak-kanak

A tertuduh untuk membuktikan kesnya. Menurut PW9, tertuduh telah memanggilnya ke rumahnya kerana dia ('tertuduh') sedang menghadapi masalah. Berikutan itu, PW9 telah pergi ke rumah tertuduh. Turut berada bersama di rumah itu adalah seorang lelaki Filipina. Sejurus kemudian, si mati tiba atas undangan tertuduh. Mereka menghisap syabu dan minum arak pada B masa sama. Tertuduh kemudian meminta mereka menyertainya dalam keretanya untuk mencari rakannya. Mereka telah berhenti di tepi sungai berdekatan taman rekreasi untuk mengutip beberapa biji batu dari sungai itu. Setelah mereka meletakkan batu tersebut di but kereta atas permintaan tertuduh, mereka berborak. Pada masa inilah tertuduh datang ke arah si mati C sambil memegang sebilah parang. Tertuduh telah mengelar kaki kiri si mati dan seterusnya menetak belakang leher si mati. Menurut PW9, muka tertuduh garang dan 'serupa mahu makan orang' apabila dia menetak leher si mati. PW9 ketakutan. Selepas itu mereka meninggalkan tempat kejadian, meninggalkan si mati yang cedera parah di situ. Apabila mereka tiba di rumah tertuduh, D tertuduh memberi amaran kepada PW9 untuk tidak memberitahu sesiapa tentang kejadian itu atau tidak dia juga akan menerima nasib sama. Kematian si mati telah disahkan oleh PW5, ahli patologi forensik, mati disebabkan oleh 'chop wound to the neck'. Dalam pembelaannya, tertuduh menyatakan bahawa dia telah membunuh si mati kerana dia mensyaki si mati mempunyai E hubungan sulit dengan isterinya. Dia kemudian memberi keterangan bahawa dia seorang penagih dadah dan bahawa pada tarikh kejadian itu dia telah mengambil '*more than one set*' dadah. Berhubung pengelaran itu sendiri, tertuduh menyatakan bahawa di taman itu, si mati telah merenungnya dan dia telah menjadi takut. Dia telah mengambil parang itu daripada bonet F keretanya, berjalan ke arah si mati dan menghayun senjata itu ke kakinya. Apabila si mati melawan dengan mencuba untuk menumbuknya, dia telah menghayun parang itu ke tangan si mati tetapi sebaliknya telah terkena lehernya. Tertuduh tidak menafikan bahawa kecederaan pada leher si mati telah disebabkan olehnya. Dia bagaimanapun mendakwa bahawa dia hanya G berniat mengelar tangan si mati dan bukan menetak lehernya.

Diputuskan, mensabit dan menjatuhkan hukuman mati ke atas tertuduh:

(1) Keterangan perubatan adalah konsisten dengan keterangan PW9 bahawa selepas tertuduh mengelar kaki si mati, dia telah menetak lehernya. Ia H tindakan yang berterusan. Adalah jelas bahawa si mati terkejut dan tidak berpeluang untuk mengelak serangan membunuh itu. Dia tidak mungkin cuba menumbuk tertuduh selepas dikelar di kaki. Tertuduh bersenjata dan si mati tidak. Perkara logik untuk dilakukan adalah untuk I melarikan diri dan bukan cuba menumbuk tertuduh. Dengan mengambil kira perjalanan biasa kejadian, tidak mungkin si mati cuba menumbuk tertuduh selepas dikelar di kaki (lihat perenggan 21).

(2) Tidak diragui bahawa apabila tertuduh membawa si mati ke taman rekreasi itu, membunuh adalah di dalam fikirannya. Parang dalam bonet

itu merupakan senjata yang diniatkan. Adalah jelas bahawa si mati dibawa ke sana untuk dibunuh. Kekejaman tindakan tertuduh adalah konsisiten dengan tindakan seorang yang penuh dengan perasaan cemburu yang membara (lihat perenggan 23).

(3) Tiada pertelingahan antara tertuduh dan si mati sama ada di rumah tertuduh, dalam kereta atau di taman. Begitu juga terdapat keterangan bahawa si mati telah berbuat sesuatu atau mengatakan apa-apa yang boleh menyebabkan tertuduh hilang kawalan dirinya. Malah di taman itu mereka mempunyai masa untuk mengutip batu dari sungai. Elemen tiba-tiba, jika adapun apa-apa provokasi tiada langsung. Rasa syak tertuduh bahawa si mati mempunyai hubungan sulit dengan isterinya bukanlah imaginasi yang membentuk provokasi serius dan tiba-tiba. Untuk pengecualian provokasi serius dan tiba-tiba terpakai sesuatu melampaui hanya rasa syak sahaja patut dibuktikan (lihat perenggan 30).

(4) Tiada apa-apa langsung dalam keterangan DW2 untuk menyokong pembelaan hilang akal. Sebaliknya, keterangannya jelas menunjukkan bahawa tertuduh tidak mengalami apa-apa penyakit mental semasa dia membunuh si mati. Bahkan, selepas membunuh, tertuduh sendiri telah memandu kereta ke rumah dan apabila mereka tiba di rumah dia telah memberi amaran kepada PW9 untuk tidak memberitahu sesiapa tentang kejadian itu. Seorang yang tidak siuman tidak mempunyai kewarasan minda untuk cuba mengelakkan akibat tindakan jenayahnya. Ini bukti jelas bahawa tertuduh bukan tidak siuman, secara sah atau sebaliknya pada masa dia menetak leher si mati. Ini adalah pembunuhan kejam yang jelas dan mudah (lihat perenggan 32 & 34).]

Notes

For cases on s 302 of the Penal Code, see 4 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 1520–1579.

Cases referred to

AEG Carapiet v AY Derderian AIR 1961 Cal 359 (refd)
Alcontara a/l Ambrose Anthony v PP [1996] 1 MLJ 209; [1996] 1 CLJ 705, FC (refd)
Balachandran v PP [2005] 2 MLJ 301; [2005] 1 CLJ 85, FC (refd)
Holmes v Director of Public Prosecutions [1946] 2 All ER 124 (refd)
Mancini v Director of Public Prosecutions [1942] AC 1 (refd)
Mat v PP [1963] MLJ 263; [1963] 1 LNS 82, HC (refd)
Miller v Minister of Pensions [1947] All ER 372 (refd)
Nanavati v State of Maharashtra AIR 1962 SC 605 (refd)
PP v Dato' Seri Anwar bin Ibrahim (no 3) [1999] 2 MLJ 1; [1999] 2 CLJ 215, HC (refd)
PP v Ibrahim Mahmud [2001] 3 CLJ 284, HC (refd)
PP v Mohd Radzi Abu Bakar [2005] 6 MLJ 393; [2006] 1 CLJ 457, FC (folld)

A *Yeap Peng Hin v PP* [1991] 4 CLJ (Rep) 285 (refd)

Legislation referred to

Criminal Procedure Code s 182A(1)
Penal Code ss 300, 300(a), (b), (c), (d) 302

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Eyu Ghim Siang (Deputy Public Prosecutor, Attorney General's Chambers) for the prosecution.
George Ngui (Ngui & Associates) for the accused.

C **Abdul Rahman Sebli JC:**

[1] The accused was charged with murder as specified in the following charge:

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> That you, on the 24th day of July, 2008, at about between 4.00 p.m. to 5.00 p.m. at Taman Rekreasi Bambangan, Kampung Modsiang, Jalan Tambunan, in the District of Penampang, in the State of Sabah, did commit murder by causing the death of one LAM AH SANG @ FOO AH SANG (M), identity card no:570607-12-5057 and that you have thereby committed an offence punishable under section 302 of the Penal Code.

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THE PROSECUTION'S CASE

F **[2]** The prosecution relies on the evidence of Foo Pow Choy ('PW9'), a childhood friend of the accused to prove its case. His evidence is that on 24 July 2008 the accused whom he affectionately called 'Along' called him by phone asking him to come over to his house as he ('the accused') was having a problem. So he went to the accused's house where the accused related to him his G problems. Also present at the house was a Filipino man. While at the house they smoked syabu together. Then another friend of the accused, a Benggali joined them at the house. This Benggali also took drug, not by smoking but by 'jarum injek'. The accused then asked the Benggali to call the deceased by phone, which the Benggali did. After making the call the Benggali left. PW9 H asked to be excused but the accused told him to wait and continued to relate to him his problems. They drank liquor at the same time.

[3] A short while later the deceased arrived at the accused's house. He joined PW9, the Filipino and the accused in the syabu smoking session. After a while I PW9 again asked to be excused but the accused told him to wait for a while. Then the accused asked them to join him to look for his friend. So they went out in a car driven by the accused. The deceased sat at the front passenger seat while PW9 and the Fillipino man sat at the back. They proceeded to Taman Rekreasi Bambangan at Jalan Tambunan and stopped by the riverside. All of

them alighted from the car. The accused told them to collect some stones from the river and put them in the boot of his car.

[4] After the deceased and PW9 had placed the stones in the boot of the car, they chatted. It was at this time that the accused approached the deceased holding a parang. He asked the deceased if the parang was sharp and straight away slashed the deceased's left leg followed by a chop on the back of the neck. According to PW9 the accused's face was fierce and 'serupa mahu makan orang' when he chopped the deceased's neck. PW9 was horrified. After that they left the scene, leaving the fatally injured deceased behind.

[5] According to PW9 before they left the scene he could hear the deceased saying 'tolong tolong' in a low voice. When they reached the accused's home, the accused warned PW9 not to tell anybody about the incident or else he too would receive the same fate. PW9 then went home by taxi.

[6] The deceased's death was certified by the forensic pathologist Dr Jessie Hiu ('PW5') to be due to 'Chop wound to the neck'. It was a horizontal wound measuring about 18cm long, 6.5cm deep and cutting the neck muscles and backbone and exposing the spinal cord. The close up photo of the injury shows a big gaping wound at the back of the neck. In the opinion of PW5 the wound was most likely caused by a sharp heavy instrument or weapon and was sufficient in the ordinary course of nature to cause death.

[7] I have scrutinised the evidence of PW9 and paid particular attention to his demeanour and manner while giving evidence. I am satisfied that he was telling the truth about what happened at the scene. I am of course mindful of the fact that demeanour alone is not the touchstone of truth because a convincing witness may be an accomplished liar: per Edgar Joseph Jr J (as he then was) in *Yeap Peng Hin v Public Prosecutor* [1991] 4 CLJ (Rep) 285.

[8] In the case of PW9 he is a childhood friend of the accused. There is no reason for him to implicate the accused with such grevious allegation unless it is the truth. There is no suggestion that he took part in the execution of the deceased. Nor is there suggestion that he knew the accused intended to kill the deceased. When asked in cross-examination why he agreed with counsel that initially the accused only intended to teach the deceased a lesson and not to kill him, PW9 said this is because the accused had never been that bad before. It must have been difficult for PW9 to testify against his childhood friend.

[9] From the line of cross-examination it is clear that the defence is not challenging PW9's evidence that the injury on the deceased's neck was caused by the accused. What the defence tried to establish through cross examination is that the accused intended to chop the deceased's arm and not the neck. In

other words the neck injury was accidental. In this regard PW9's testimony is that he would not know which part of the deceased's body the accused intended to slash as it happened so fast.

[10] As for the motive for the killing PW9 provided some clue when he said under cross-examination that the accused told him that his wife had sexual relationship with several men and had run away from him. He did not mention the deceased's name though.

THE OFFENCE OF MURDER

[11] Murder is defined by s 300 of the Penal Code as follows:

> Except in the cases hereinafter excepted, culpable homicide is murder:-
>
> (a) If the act by which the death is caused is done with the intention of causing death;
>
> (b) If it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the death is caused;
>
> (c) If it is done with the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death; or
>
> (d) If the person committing the act knows that it is so imminently dangerous that it must in all probability cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death, or such injury as aforesaid.

[12] The elements of the charge that the prosecution needs to prove beyond reasonable doubt are the following:

(a) That the deceased had died.

(b) That he died as a result of the wound on the back of his neck.

(c) That the wound on the back of the deceased's neck was caused by the accused.

(d) That in inflicting such injury the act was committed by the accused with the mens rea under s 300(a), or (b), or (c) or (d) of the Penal Code.

WHETHER PRIMA FACIE CASE ESTABLISHED

[13] A prima facie case arises when the evidence in favour of a party is sufficiently strong for the opposing party to be called on to answer. The evidence adduced must be such that it can be overthrown only by rebutting evidence by the other side. Taken in its totality, the force of the evidence must

be such that, if unrebutted, it is sufficient to induce the court to believe the existence of the facts stated in the charge or to consider its existence so probable that a prudent man ought to act upon a supposition that those facts existed or did exists: per Augustine Paul J (as he then was) in *Public Prosecutor v Dato' Seri Anwar bin Ibrahim (no 3)* [1999] 2 MLJ 1; [1999] 2 CLJ 215.

[14] In deciding whether the prosecution had established a prima facie I had applied the test laid down by the Federal Court in *Public Prosecutor v Mohd Radzi Abu Bakar* [2005] 6 MLJ 393; [2006] 1 CLJ 457 which is as follows:

> Put shortly, what the trial court is obliged to do under ss 173(f) and 180 of the CPC is to ask itself the question: If the accused elects to remain silent, as e is perfectly entitled to do, am I prepared to convict him on the evidence now before me? See, *Dato' Mokhtar bin Hashim & Anor v Public Prosecutor* [1983] 2 MLJ 232. If the answer to that question is in the affirmative, then the defence must be called. And if the accused remains silent, he must be convicted. If the answer is in the negative, then the accused must be acquitted.

[15] On the evidence before the court, it is clear to me that a prima facie case had been established against the accused at the close of the prosecution's case. I am satisfied that every element of the charge has been proved by the prosecution which if unrebutted would warrant the accused's conviction. When one chops another person's neck, the intention must be to cause his death.

THE DEFENCE'S CASE

[16] The duty of the court at the end of the trial is to consider all the evidence produced before it and to decide whether the prosecution has proved its case beyond reasonable doubt: see s 182A (1) of the Criminal Procedure Code. If, upon a review of the whole evidence there is a reasonable doubt as to the guilt of the accused, he must be acquitted: *Public Prosecutor v Ibrahim Mahmud* [2001] 3 CLJ 284. A case is said to have been proved beyond reasonable doubt only upon a consideration of all the evidence adduced: *Balachandran v Public Prosecutor* [2005] 2 MLJ 301; [2005] 1 CLJ 85.

ACCUSED'S EXPLANATION

[17] The accused chose to give evidence on oath. He started off by saying that he and the deceased were close friends. Asked why he killed the deceased he said it was because he suspected the deceased of having an affair with his wife. He went on to testify that he is a drug addict and that on the date of the

A incident he took 'more than one set' of drug. He said when he reached the recreation park he was having a headache as he had not been sleeping for more than ten days.

[18] On the actual slashing itself, his explanation is that while they were at
B the park the deceased stared at him and he became scared. He said he tried to look for a weapon and found one at the bonnet of his car. He took the parang and walked towards the deceased and swung the parang at his leg. When the deceased retaliated by trying to punch him he swung the parang at the deceased's hand but hit his neck instead. He said he then panicked and drove
C home.

[19] The only other witness called by the defence was Kumarasawami a/l S Kannan ('DW2'), a psychiatrist attached to Hospital Mesra Kota Kinabalu at the time of the accused's admission after his arrest. In his report ('D1') DW2
D recorded the accused's history. Amongst others the accused told DW2 that he was imprisoned in 2006. Upon his release he found that his wife had left him. This angered him and his anger mounted when he was told by his friends that she had an affair with the deceased while he was in prison.

E EVALUATION OF THE DEFENCE EXPLANATION

[20] The accused did not deny that the injury on the deceased's neck was caused by him. He however claimed that he only intended to slash the deceased's hand and not to chop his neck. This is inherently improbable. If, as
F claimed by him he was swinging the parang at the deceased's hand as the deceased was trying to punch him the deceased would have sustained injury on his hand, but there was none. Medical evidence shows only two wounds, one on the back of the neck and the other an incised wound on the left leg.

G **[21]** The medical evidence is consistent with PW9's evidence that after the accused slashed the deceased's leg he chopped his neck. It was a continuous act. It is clear that the deceased was completely taken by surprise and had no chance of avoiding the murderous assault. He could not have tried to punch the accused after being slashed on the leg. The accused was armed and he was not.
H The logical thing to do would have been to run away instead of trying to punch the accused. Having regard to the ordinary course of events it is just not possible that the deceased tried to punch the accused after being slashed on the leg. This allegation was also not put to PW9 in cross-examination. On this point suffice for me to cite the oft quoted observation of Mukharji J in *AEG*
I *Carapiet v AY Derderian* AIR 1961 Cal 359 where he said:

> The law is clear on the subject. Wherever the opponent has declined to avail himself of the opportunity to put his essential and material case in cross examination, it must follow that the testimony given could not be disputed at all. It is wrong to think that this is merely a technical rule of evidence. It is a rule of essential justice.

[22] However failure on the part of the defence to put its case as aforesaid can never, by itself, relieve the prosecution of its duty of establishing the charge against the accused beyond all reasonable doubt: see *Alcontara a/l Ambrose Anthony v Public Prosecutor* [1996] 1 MLJ 209; [1996] 1 CLJ 705 per Edgar Joseph Jr J.

[23] I reject the accused's claim that he had accidentally chopped the deceased's neck. I have no doubt that when the accused brought the deceased to the recreation park murder was on his mind. The parang in the bonnet was the intended weapon. It is obvious that the deceased was brought there to be executed.

[24] Is the defence of grave and sudden provocation available to the accused? This defence was not raised by counsel in his final submissions but in my view it is the duty of the court to consider the defence nonetheless as the accused did make an oblique reference to jealousy as the reason for the killing. He was asked in examination in chief why he slashed the deceased and his answer was that he suspected the deceased of having an affair with his wife. In cross-examination it was put to the accused by the DPP that he inflicted the injuries on the deceased because the deceased was having an affair (as opposed to mere suspicion) with his wife and he agreed. There seems to be no other motive for the murder.

[25] The brutality of the accused's act is also consistent with the act of a man consumed by the raging fire of jealousy. But the question that the court has to consider is whether the accused was actuated by grave and sudden provocation when he killed the deceased. Exception 1 to s 300 of the Penal Code provides as follows:

> Exception 1 — Culpable homicide is not murder if the offender, whilst deprived of the power of self control by grave and sudden provocation, causes the death of the person who gave the provocation, or causes the death of any other person by mistake or accident.

[26] The common law concept of provocation was enunciated by Viscount Simon LC in *Mancini v Director of Public Prosecutions* [1942] AC 1 where he laid down the following test at p 9:

> It is not all provocation that will reduce the crime of murder to manslaughter. Provocation, to have that result, must be such as temporarily deprives the person provoked of the power of self control, as the result of which he commits the unlawful act which causes death … The test to be applied is that of the effect of the provocation on a reasonable man, so that an unusually excitable or pugnacious individual is not entitled to rely on provocation which would not have led an ordinary person to act as he did. In applying the test, it is of particular importance

A (a) to consider whether a sufficient interval has elapsed since the provocation to allow a reasonable man time to cool, and (b) to take into account the instrument with which the homicide was effected, for to retort, in the heat of passion induced by provocation, by a simple blow, is a very different thing from making use of a deadly instrument like a concealed dagger. In short, the mode of resentment must bear a reasonable relationship to the provocation if the offence is to be reduced to manslaughter.

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[27] In *Holmes v Director of Public Prosecutions* [1946] 2 All ER 124 Lord Simon said:

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The whole doctrine relating to provocation depends on the fact that it causes, or may cause, a sudden and temporary loss of self control whereby malice, which is the formation of an intention to kill or to inflict grevious bodily harm, is negatived. Consequently, where the provocation inspires an actual intention to kill, or to inflict grevious bodily harm, the doctrine that provocation may reduce murder to manslaughter seldom applies. Only one very special exception has been recognized viz, the actual finding of a spouse in the act of adultery.

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[28] In *Nanavati v State of Maharashtra* AIR 1962 SC 605 the Supreme Court of India held that the test of 'grave and sudden' provocation is whether a reasonable man, belonging to the same class of society as the accused, placed in the situation in which the accused was placed would be so provoked as to lose his self-control.

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F **[29]** Whether the provocation was grave and sudden enough to prevent the offence from amounting to murder is a question of fact: see the Explanation to Exception 1 to s 300 of the Penal Code.

[30] Now, having regard to the principles where does the defence of provocation fit in? I would say nowhere. There was no argument between the accused and the deceased either at the accused's house, in the car or at the park. Neither is there evidence that the deceased had done something or said anything that could cause the accused to lose his self control. At the park they even had time to collect stones from the river. The element of suddenness, if at all there was any provocation is completely absent. The accused's suspicion that the deceased was having an affair with his wife cannot by any stretch of the imagination amount to grave and sudden provocation. For the exception to apply something beyond mere suspicion must be established.

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I **[31]** The position in England as can be seen in *Holmes* is that the one very special exception recognized as grave and sudden provocation is the actual finding of a spouse in the act of adultery. In the context of Malaysian society however I do not think it should reach that degree before adultery can amount to grave and sudden provocation. If the circumstances were sufficient to cause

a reasonable man to conclude that his spouse had committed adultery prior to the killing that will be sufficient to constitute grave and sudden provocation. For example if a man, upon returning home sees another man jumping out of the window under circumstances which creates grave suspicion that the man had committed adultery with his spouse that can amount to grave and sudden provocation. If the man kills his spouse whilst deprived of his power of self control that is not murder.

[32] It is also the defence case that the accused was legally insane at the time he chopped the deceased's neck. However learned counsel did not even bother to refer to the expert evidence of the psychiatrist ('DW2') in his submissions. This is understandable because there is absolutely nothing in DW2's evidence to support the defence of insanity. On the contrary his evidence clearly shows that the accused was not suffering from any infirmity of the mind when he killed the deceased.

[33] Counsel submitted that the accused was likely to be suffering from substance induced psychosis due to consumption of drug and alcohol at the time of the killing so that when he attacked the deceased he could not have the intention to kill him. With due respect this argument flies in the face of the evidence. The undisputed fact is that when the accused drove to the recreation park he did not show any sign of abnormality. He was driving and talking normally along the way. More significantly before he put his nefarious plan into action he asked the three men to collect stones from the river and to put them in the boot of his car. In my view this was a pretext to allow the boot to remain open to facilitate quick access to the parang.

[34] After the killing the accused himself drove the car home and when they reached home he warned PW9 not to tell anybody about the incident. An insane person would not have the presence of mind to try to avoid the consequences of his criminal act. This is clear proof that the accused was not insane, legally or otherwise at the time he chopped the deceased's neck. I am not satisfied that the defence of insanity has been proved on the balance of probabilities, if at all such defence is available to the accused. This was cold blooded murder pure and simple.

[35] It is settled principle that even where the court rejects the accused's explanation, the court must not proceed to convict unless the court is satisfied that the accused's explanation has not raised any reasonable doubt in the court's mind as to the guilt of the accused. The prosecution would fail to satisfy the onus which lies upon it if on the whole of the evidence the court is left in a reasonable doubt as to his guilt: see *Mat v Public Prosecutor* [1963] MLJ 263; [1963] 1 LNS 82; *Public Prosecutor v Mohd Radzi Abu Bakar*. However proof

beyond reasonable doubt must not be confused with proof beyond the shadow of a doubt. As Lord Denning said in *Miller v Minister of Pensions* [1947] All ER 372:

> Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence 'of course it is possible, but not in the least probable', the case is proved beyond reasonable doubt, but nothing short of that will suffice.

[36] Having considered all the evidence in the present case I am left in no reasonable doubt that the accused is guilty of the offence charged. I am satisfied that the prosecution has discharged its burden of proving the case beyond any reasonable doubt. In the circumstances the accused was convicted of the offence charged and sentenced to death.

Accused convicted and sentenced to death.

Reported by Ashgar Ali Ali Mohamed